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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

SAN FRANCISCO BRANCH OFFICE

CYTEC PROCESS MATERIALS (CA), INC., Employer, and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 725, Charging Party.	No. 21-CA-187639 21-CA-191718 21-CA-196463 **JOINDER AND SEPARATE CLOSING BRIEF OF INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 725**

I. JOINDER IN THE BRIEF OF THE GENERAL COUNSEL

The Union, as Charging Party, agrees and joins with the analysis and argument as set forth in the brief of counsel for the General Counsel. The Union in addition provides additional briefing regarding the allegations in the complaint related to the Employer's unilateral and retaliatory changes to the meal and rest break schedules and rest break off-campus policy.

II. CALIFORNIA LAW REGARDING MEAL PERIODS AND REST BREAKS

The company's human resource manager, Reina Peralta, testified regarding her decision, in her first week on the job, to change the meal and rest period schedules of the employees. This also included a decision to prohibit the employees from leaving the premises during rest breaks.

Ms. Peralta testified that meal breaks in California need to be taken before the 5th hour, and that rest breaks had to be taken at the 2nd and 6th hour. As such, she unilaterally changed the meal schedule of employees without bargaining with the Union. Further, she determined that the company did not have an obligation to allow the employees off-premises during their rest breaks and unilaterally discontinued the established and long-standing practice. The decision was made on Wednesday and was communicated, in the form of a new schedule, on Thursday.

The presentation of the new schedule without providing the Union with sufficient time to meaningfully bargain over the proposal and the presentation of the new schedule as a completed company change is a violation of 8(a)(1) and (5). *See, i.e.*, *Mackie Automotive Systems*, 336 NLRB 347 (2001); *Laro Maintenance Corp*., 333 NLRB 958 (2001).

Neither change was required by law. Meal periods are governed by two sections of law – California Labor Code section 512 and Industrial Welfare Commission, Wage Order 1, section 11. Under the terms of both, no employee working a full day is required to work into a 6th hour without having a meal period.

Labor Code section 512 reads, in relevant part:

> (a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the

> commission determines that the order is consistent with the health and welfare of the affected employees.

Section 11 of IWC Wage Order 1 (codified at 8 CCR 11010), applicable to employees in the manufacturing industry, reads, in relevant part:

> No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

The issue of the appropriate timing of meal period has been heavily litigated and the California Supreme Court provided a definitive answer on the topic in *Brinker v. Superior Court*, 53 Cal.4th 1004 (2012). It held, "section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Brinker,* 53 Cal.4th at 1041. Thus, there was no legal obligation on the part of Cytec to modify the meal break schedule as the existing schedule was in compliance with state law. The meal period need not start at the beginning of the 5th hour of work as testified to by Ms. Peralta; the meal period needs to start no later than the end of the 5th hour of work (phrased otherwise as before the beginning of the 6th hour of work).

The Court fully explored the timing issue and held:

> [T]he statute requires a first meal period no later than the start of an employee's sixth hour of work. Section 512, subdivision (b) resolves the ambiguity. It provides: "Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees." The provision employs the language of timing: the IWC may adopt a rule "permitting a meal period to *commence* after six hours," i.e., as late as six hours into a shift. (*Ibid.*, italics added.) By beginning with "Notwithstanding subdivision (a)," the provision further indicates that any such timing rule would otherwise contravene subdivision (a). Only if subdivision (a) was intended to ensure that a first meal period would commence sooner than six hours, after no more than five hours of work, would this be true.

Id. There was no legal requirement to change the timing of meal periods, and thus the employer was not privileged to do so without bargaining with the union until resolution on the issue or the

full CBA, or complete impasse was reached between the parties. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999).

IWC Wage Order 1, section 12, provides for rest breaks for employees in manufacturing facilities. It reads:

> Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours.

There is nothing in the language of the rest break provision that dictates the location in which rest breaks must be taken. There is no other statutory provision that dictates when or where rest breaks are to be taken. Although break time must be counted as time worked, there is no statutory or legal basis for requiring an employee to remain on site. Nothing in Labor Code, Code of Regulations, or published court decisions obligates the employer to dictate that employees stay on site.

The employees at Cytec had long enjoyed rest breaks taken off premises. They would go down the street to the 7-11 to purchase snacks and drinks and would return to their work locations within the time allotted for the break. The employer unilaterally changed this practice. While it is legal as a general practice to restrict employees to the work location during a break, it is not legal to change the existing longstanding practice without the consent of the union. *NLRB v. Katz*, 369 U.S. at 747.

The timing of this change, without a legal obligation to do so, was made shortly after the employees used a rest break to hold a strike authorization vote. As there was no legal necessity to make the change, and it occurred close in time to the employees' concerted protected activity and employer's surveillance of the same, it is reasonable to infer that there was no legitimate

basis for the change and the change was made in response to union activity. *See Parsippany Hotel Mgmt. Co.*, 317 NLRB 114 (1995), *enf'd* 99 F.3d 413 (D.C. Cir. 1996).

III. PROPOSED FINDINGS AND CONCLUSIONS

The Union joins in the proposed findings and conclusions provided by counsel for the General Counsel.

Dated: November 22, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ CAREN SENCER
By: CAREN P. SENCER

Attorneys for Charging Party INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 725

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On November 22, 2017, I served the following documents in the manner described below:

JOINDER AND SEPARATE CLOSING BRIEF OF INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 725

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 22, 2017, at Alameda, California.

Lara Hull